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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1138

In the Matter of: CROSS CONTRACTING COMPANY, INC., a Louisiana corporation, FOR EXONERATION FROM and/or LIMITATION OF LIABILITY AS OWNER OF DRILL BARGE NO. 2.

CROSS CONTRACTING COMPANY;
Petitioner,

vs.

JOSEPH LAW, JR., WILLIE MANN, JR., LESLIE SMITH, MELBOURNE B. SMITH, and JOSEPH GRAY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF RESPONDENTS

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LIST OF AUTHORITIES

Florida Bahamas Lines, Ltd. v. *The "Barge Star 800"*, 433 F.2d 1243 (5th Cir. 1970) 5

Jackson v. *Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967) 3

Liverpool B.&R.P.S. Navigation Co. v. *Brooklyn Eastern District Terminal*, 251 U.S. 48 (1919) 7, 8

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Reed v. *S.S. Yaka*, 373 U.S. 410 (1963) 3

Sacramento Nav. Co. v. *Salz*, 273 U.S. 326 (1927) 7, 8

Standard Dredging Co. v. *Kristiansen*, 67 F.2d 548 (2nd Cir. 1933) 8

Williams v. *Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971) 4

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied and state unto the Court:

The Petition does not state adequate grounds for review of the judgment below by this Court. The Petitioner fails to demonstrate that the judgment below conflicts with any outstanding decision of this Court or conflicts with the status of this issue of law in any other circuit, or that it presents a question of overriding public interest which was not properly determined below.

The opinion of the court below, set forth in Appendix B of the Petition, clearly demonstrates that it is based upon the latest ruling of this Court, and follows other circuits' holdings on the same point of law without any conflict of circuits.

The Petitioner, however, now insists that it was performing a non-maritime contract, which assertion goes to the very heart of the reason for this Petition and Petitioner's failure *ab initio* to demonstrate any good faith in this cause.

The Respondents, who are the Claimants below, were Petitioner's employees constructing a levee in Lake Okeechobee under a contract with the Corps of Engineers. In the performance of this contract Petitioner used dynamite drill barges, pump barges, and floating draglines.

The levee was constructed by moving fill from the bottom of the lake and depositing it in a line 600 feet west of the east shoreline of the lake. The bed rock that could not be moved by the dragline under the top layers of silt, had to be loosened by the drill barges blasting the bottom with dynamite to a depth of 30 feet. Payment to Petitioner was made by calculating the number of yards of fill the entire operation moved from the bottom of the lake to the levee each month. These monthly accountings are in evidence. (Record, pages 30-51).

The accident occurred on November 11, 1966, when Drill Barge No. 1 finished drilling and setting its dynamite in the bottom of the lake, moved away and detonated its charge; the charge still being set under Drill Barge No. 2 some 350 feet to the north, simultaneously detonated, causing the accident, which is the subject of the lawsuit. The injuries occurred on Barge No. 2, afloat on Lake Okeechobee, to men assigned to Barge No. 2 and Barge No. 1, who were on Barge No. 2 at the time.

The claimants each filed suits at law under the Jones Act, Title 46, U.S.C.A., Section 688, and pursuant to the holdings of this Court in *Jackson* v. *Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967); *Reed* v. *S.S. Yaka*, 373 U.S. 410 (1963).

The Petitioner then filed its Petition for Limitation of, or Exoneration from Liability, as owner of Drill Barge No. 2, under the statutes, Title 46, United States Code, Sections 183(a), 185, which are set forth in the Petition and Appendix to the Petition. With the filing, Petitioner posted an ad interim stipulation for value in the amount of $25,000.00, representing only the value of Barge No. 2, in lieu of surrender thereof. Barge No. 1 was ignored in the limitation petition.

Concurrent with filing the Petition, the District Judge entered an injunction on Petitioner's *ex parte* application preventing these claimants from further prosecuting their actions at law against this Petitioner.

It is therefore peculiar for the Petitioner to now come into this Court and claim that there was no maritime contract when it was the Petitioner himself who invoked the maritime jurisdiction of the Federal Courts to its own benefit. See Paragraph XII of the complaint, page 7 of the Record.

Jurisdiction was apparently resolved between the Petitioner and the claimant, Leslie Smith, in his claim under the Longshoremen's and Harbor Worker's Compensation Act. This issue was thoroughly reviewed before the Department of Labor by the Deputy Commissioner and affirmed on appeal to the District Court. No further appeal was taken.

This Court, of course, will take judicial notice of geographical facts such as Lake Okeechobee being navigable waters of the United States within the jurisdiction of the Corps of Engineers.

Since the accident occurred during harbor improvement operations under the control of the Corps of Engineers, there should be no further question of the contract being maritime and that the accident occurred on the navigable waters of the United States. *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969); *Williams* v. *Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971).

In addition, it was the Petitioner who applied for the injunction preventing the injured men, three of whom have not been able to work since the accident, from prosecuting their claims at law. Nobody twisted Petitioner's corporate arm to file the Petition; it was voluntarily done to take advantage of and to benefit from the admiralty and maritime jurisdiction of the United States and the Federal Courts. Rule F, Supplemental Rules for Admiralty and Maritime Claims, Federal Rules of Civil Procedure, 28 U.S.C.A.

The Petitioner states to this Court that he will in all probability not be able to post the funds required by the District Court's Order of September 23, 1970 (Appendix A). It is clearly inferred from the evidence, which has been submitted by way of pre-trial depositions, the reasons

this Petitioner pressed for delay from early termination of the actions at law filed by the claimants. Petitioner has used this time well by completing all of its pending government contracts, and then depleting the assets of this corporation and transferring them to other corporations owned by the same principals and performing essentially the same work. It would seem in retrospect that the Petition for Limitation of Liability may have been filed as a ruse to deceive the Courts in order to gain time to secrete the assets beyond the reach of the Marshal's hammer. This Petition is also apparently being pursued with the same sincerity, to gain further delay to allow additional time to remove the assets an additional step away from judgment creditors.

These Respondents want to have their day in court. This case finally has been set for pre-trial conference for May 24, 1972, and for trial on June 12, 1972. It would constitute a gross injustice to further delay the trial of this cause, or to have to reactivate the now enjoined actions at law for the purpose of going to trial sometime many years hence.

The court below in many decisions has consistently affirmed the equity function of an admiralty court. See, *Florida Bahamas Lines, Ltd.* v. *The "Barge Star 800"*, 433 F.2d 1243 (5th Cir. 1970), and citations therein. Equity can best be served by requiring this Petitioner to go forward to trial on June 12, 1972, on its own complaint.

It would be a farce to have allowed this Petitioner all these years to prevent these men from having their day in court, by the *ex parte* injunction issued pursuant to the admiralty procedure and maritime jurisdiction of the District Court and then allow additional time so that they could take their assets further away from the Marshal's

reach, under the belated defense that the admiralty jurisdiction was wrongfully invoked in the first instance.

At issue is whether the judgment sought to be reviewed is consistent with the interpretation of the statutes by this Court and by other circuits. If any conflict between circuits exists, we feel it is demonstrated by the partial dissent to the "freight pending" issue filed by Judge Godbold, Appendix B, commencing at page 28, of the Petition. The Respondents are not hereby raising this issue by cross-petition although the evidence in the file and review of *stare decisis* confirms that Judge Godbold was correct in stating that the burden of proving freight pending was placed by statute on the shipowner, this Petitioner. However, the Respondents are willing to let that issue rest because they want to go to trial.

The amount of $247,000.00, which the District Judge ordered Petitioner to post into the registry of the court in lieu of surrendering the vessels would hardly begin to pay the damages suffered by one of the claimants, much less all five, if posted.

The claimants are essentially uneducated black workers, who were engaged in relatively high paying jobs which their backgrounds and training would not ordinarily afford. They were all young men with families. Three of them have been totally disabled since the accident and in all likelihood will remain disabled for the remainder of their lives. The other two suffered severe injuries, but made substantial recovery. For this reason, they do not ask this Court to delay the trial of this cause any further for the purpose of gaining some Pyhrric victory requiring the posting of freight pending. If the Respondents felt that this issue could be resolved prior to the scheduled trial of the cause on June 12, 1972, and the money be posted, we would certainly ask this Court to review the issue of "pend-

ing freight" because the majority opinion below on that point seems to conflict with the statute and interpretations thereof in other circuits.

However, such a review would be an exercise in futility if the trial is to be delayed by requesting it. As Petitioner states, in all probability, he will not post any additional ad interim stipulation for value to reach $247,000.00, much less in excess of $100,000.00 more for pending freight. It wouldn't seem to matter to these Respondents at this point whether Petitioner refuses to add $222,000.00, or that the figure is $330,000.00, which Petitioner will not post.

For this reason alone, regardless of any additional amount Petitioner refuses to post, or the outcome of this issue, it would seem that the issues raised are moot and do not go to any justiciable issue, and that this Petition should be rejected, because Petitioner has nothing at stake by reason of any order entered.

On the principal issue of the application of the "flotilla doctrine" to this case, we do not see how we could improve on Judge Ainsworth's opinion below. The authorities are not extensive, and he cites them all. Appendix B, pages 21-28.

Nor do we attempt to call on greater erudition than Judge Learned Hand, cited so extensively by Judge Ainsworth at pages 25-28.

Petitioner would have this Court revert to *Liverpool B.&R.P.S. Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U.S. 48 (1919), and ignore *Sacramento Nav. Co.* v. *Salz*, 273 U.S. 326 (1927). In the latter case, this Court obviously found it necessary to distinguish the harsh rule stated in the former, and did so.

Judge Learned Hand then added the final explanation in *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548 (2nd Cir. 1933), which has been adopted at every turn since then by every court which has faced any problem involving the flotilla doctrine. There has been no deviation from the *Sacramento Navigation-Standard Dredging* distinctions of *Liverpool* for 45 years. There does not seem to be any compelling need to do so now.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be denied quickly and permit the trial to go forward on June 12, 1972.

Respectfully submitted,

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By .....

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Respondents was mailed this ..... day of April, 1972 to the following attorneys of record:

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